

# CARLSMITH BALL LLP

A LIMITED LIABILITY LAW PARTNERSHIP

ASB TOWER, SUITE 2100  
1001 BISHOP STREET  
HONOLULU, HAWAII 96813  
TELEPHONE 808.523.2500 FAX 808.523.0842  
WWW.CARLSMITH.COM

DIRECT DIAL NO.  
808.523.2526

ISANDISON@CARLSMITH.COM

April 15, 2016

## Via Hand Delivery

Suzanne Case, Chairperson  
and Members of the Board of Land & Natural Resources  
Department of Land & Natural Resources, State of Hawai'i  
Administrative Proceedings Office  
1151 Punchbowl Street, Room 130  
Honolulu, HI 96813

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DEPT. OF LAND  
& NATURAL RESOURCES  
STATE OF HAWAII

Subject: Case No. BLNR-CC-16-002: Response to Minute Orders Nos. 1 and 2

Dear Chairperson Case and Members of the Land Board:

As you are aware, we represent the University of Hawai'i at Hilo (the "University") in the above-referenced matter before the Board of Land & Natural Resources (the "Board"). Pursuant to Minute Order No. 1 and Minute Order No. 2, entered on April 1, 2016 and April 8, 2016, respectively, we write on behalf of our client to comment on the process followed in delegating the conduct of a contested case hearing to, and the selection of, a hearing officer in this proceeding. For the reasons set forth herein, the University believes that the Board has acted consistent with applicable laws in its delegation of authority to a hearing officer pursuant to Section 13-1-32(b) of the Hawai'i Administrative Rules ("HAR"), and the subsequent selection of Judge Riki May Amano pursuant to Hawai'i Revised Statutes ("HRS") Chapter 103D. While the University has no objections to the selection of Judge Amano to serve as the hearing officer based on her disclosures and other submittals following the Circuit Court's Remand Order of February 22, 2016, the University reserves its right to modify or supplement the following comments based on any comments submitted by the other parties in this proceeding.

A. The Board Complied with Applicable Laws in Its Delegation of Authority to Conduct a Contested Case Hearing

Once a contested case hearing is required, the Board "may conduct the hearing or, *at its discretion*, delegate the conduct of the contested case hearing to a hearing officer, in which case the chairperson shall select such hearing officer." HAR § 13-1-32(b) (emphasis added). Here, consistent with the Supreme Court's decision in *Mauna Kea Anaina Hou v. BLNR*, 136 Hawai'i 376, 363 P.3d 224 (2015) and its subsequent order of remand to the circuit court, the circuit court remanded the matter back to the Board to conduct a contested case hearing. According to Minute Order No. 2, the Board met on February 26, 2016—as part of and to discharge its

adjudicatory functions—to determine how to proceed with the contested case hearing. After full discussion of the issue, the Board delegated the conduct of the contested case hearing to a hearing officer, pursuant to HAR § 13-1-32(b), and confirmed that Chairperson Case was authorized to engage the services of a hearing officer pursuant to applicable law. *See* Minute Order No. 2 (April 8, 2016). Under HAR § 13-1-32(b), the Board acted within its authority to delegate the conduct of a contested case hearing to a hearing officer.

HRS Chapter 92 (the “Sunshine Law”) requires that all meetings held by an agency board be open to the public. However, the Sunshine Law does not apply to boards exercising adjudicatory functions, such as conducting a contested case hearing pursuant to HRS § 91-8. *See Outdoor Circle v. Harold K.L. Castle Trust Estate*, 4 Haw.App. 633, 641, 675 P.2d 784, 790 (1983) (noting that the Sunshine Law does not apply to adjudicatory functions of administrative agencies other than the Land Use Commission).

The Board’s power to hold a contested case hearing is part of its adjudicatory function. Thus, actions related to how the Board discharges that function—*i.e.*, whether to delegate to a Hearing Officer—falls within the “adjudicatory function” exemption to the Sunshine Law. The State of Hawai‘i Office of Information Practices (the “OIP”) has previously acknowledged that the definition of “adjudicatory functions” includes the contested case hearing *as a whole*, not just the deliberative process. Ex. 1, OIP Opinion Letter No. 04-14 at 3 (August 27, 2004). In that case, the OIP opined that the “adjudicatory functions” exception encompasses a staff briefing for a board regarding a pending contested case, even though the briefing occurred before the hearing itself. *Id.* at 5. In so doing, the OIP held that the Hawai‘i statute does not specifically limit the exception to deliberations. *Id.* at 3. Moreover, the legislative history of the Sunshine Law indicates that the contested case process as a whole includes sufficient safeguards of the public interest, making the application of the Sunshine Law unnecessary in these types of situations. *Id.* (citing Senate Stand. Comm. Rep. No. 878, 8th Haw. Leg., 1st Sess., S.J. 1177, 1178 (1975)). For the foregoing reasons, the “adjudicatory functions” exception should apply to actions related to the contested case hearing itself, including the decision to delegate authority to a hearing officer, as well as the selection of a hearing officer. Therefore, from the information available, it appears that the Board properly exercised its discretion to delegate the conduct of a contested case hearing to a Hearing Officer without first holding a public hearing.

B. The Board Complied with Applicable Laws for the Selection of a Hearing Officer

While HAR § 13-1-32(b) gives the Board Chairperson the authority to select the hearing officer, HRS Chapter 103D governs the process by which the Chair may make her selection. Specifically HRS § 103D-304 sets forth the process for the procurement of professional services—such as a hearing officer—by a state governmental agency. The procurement process involves four main steps:

1. Assembly of Applicant List: Pursuant to HRS § 103D-304(b) and (c), before the beginning of each fiscal year, the subject agency must solicit statement of qualifications and expressions of interest, and assemble and vet a list of qualified persons to provide professional services the agency anticipates needing in the next fiscal year. Additional

notices soliciting further applicants, and review and evaluation of all resulting materials, shall be made to the extent necessary.

2. Designation of Selection Committee: Pursuant to HRS § 103D-304(d), when the agency needs a particular professional service, the head of the agency designates a selection committee comprised of a minimum of three persons,
3. Ranking of Qualified Individuals: Pursuant to HRS § 103D-304(e) and (d), the designated selection committee must evaluate and rank a minimum of three candidates to send to the head of the agency for contract negotiations pursuant to HRS § 103D-304(g).
4. Negotiation of Contract: Pursuant to HRS § 103D-304(g), the head of the agency must then negotiate a contract with the first ranked person, and if unsuccessful, the second ranked person, and so on.

In this case, the University understands that Chairperson Case solicited though publication applications for the hearing officer needed for this matter, and assembled a list of applicants qualified to be Board hearing officers, satisfying the first step. Ex. 2. In accordance with the second and third steps, a selection committee (“Committee”) consisting of Justice (ret.) James Duffy, Deputy Attorney General Stella Kam, and Board Member Christopher Yuen,<sup>1</sup> evaluated and ranked the top three qualified candidates. Ex. 3. The Committee then referred the final three candidates to Chairperson Case for contract negotiations. *Id.* Pursuant to the fourth step, Chairperson Case negotiated a contract with the first ranked candidate, Judge Riki May Amano. *See* Minute Order No. 1. As it appears that the Board and Chairperson Case followed the procurement process set forth in Chapter 103D, the University believes the selection of Judge Amano was procedurally proper.

Moreover, Committee’s evaluation of the candidates and Chairperson Case’s negotiations with Judge Amano are actions required to be confidential and thus are not subject to the Sunshine Law. HAR §§ 3-122-63(b) and 3-122-9.01(c) require that information related to the selection of a hearing officer be kept confidential until after the contract is awarded. Moreover, HRS § 103D-304(h) requires the agency head’s negotiations to be conducted confidentially, rather than in meeting that is open to the public. HRS § 103D-105 provides that the Sunshine Law shall not apply to actions required to be conducted or made confidentially under HRS Chapter 103D. Therefore, Committee’s actions and Chairperson Case’s contract negotiations are exempt from the Sunshine Law.

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<sup>1</sup> Mr. Wurdeman appears to object to the inclusion of Mr. Yuen on the Committee. HAR 3-122-69(b) states that “[d]eputy directors or equivalent appointed positions shall not serve on review or selection committees.” As discussed in the April 14, 2016 from the Attorney General, State of Hawai’i (the “AG”), Mr. Yuen is a member of the Board, but is not a deputy director. Ex. 4. Unlike deputy directors, Board members are independent and are not controlled or under the direction of the Board Chairperson. *Id.* at 3. Therefore, Board members are not “equivalent appointed positions” as contemplated by HAR § 2-122-69(b), and Mr. Yuen’s inclusion on the Committee did not violate the rules. *Id.*

C. The Board Complied With Applicable Laws in Withholding Certain Materials Relating to the Selection of the Hearing Officer

By letter dated April 4, 2016 to the Board, Mr. Wurdeman requested copies of (1) the contract between the Board and Judge Amano; (2) the list of qualified persons; (3) the Committee's criteria for selecting the hearing officer; and (3) "statement of qualifications and related information submitted by the qualified persons." Ex. 5. On April 14, 2016, the AG provided a redacted copy of the contract with Judge Amano and referred Mr. Wurdeman to HRS § 103D-304(e), which establishes the selection criteria—in descending order of important—that the Committee was required to consider in evaluating the candidates. Ex. 4.

The AG declined to disclose the remaining requested information as well as Judge Amano's negotiated rate pursuant to HRS Chapter 92F ("UIPA"). *Id.* at 2. Under UIPA, "government purchasing information records are open to public inspection unless prohibited by section 92F-13." HRS § 92F-12(a)(3). HRS 92F-13(3), in turn, allows an agency to withhold government records where disclosure would frustrate a legitimate government function. As noted by the AG, because the public's objections may result in the removal of Judge Amano as the hearings officer, the Board may need to negotiate with a second or third ranked applicant. Ex. 4 at 2. Thus, revealing Judge Amano's negotiated rate, the identities of alternate candidates and their ranking, and information about the candidates' qualifications would adversely affect the Board's position in negotiations with the other candidates. Impairment of the Board's ability to negotiate a contract falls within the "frustration of a legitimate government function" exception to UIPA, and the Board may withhold the requested information. Importantly, the AG indicated that the Board's decision to withhold the requested documents is only temporary. Ex. 4. Once the contested case hearing has begun and the risk to the Board's legitimate government function has passed, the Board will provide the requested documents to Mr. Wurdeman. Therefore, the Board properly withheld that information until such time as the hearing officer's selection is final—*i.e.*, the commencement of the contested case hearing.

\* \* \* \*

Additionally, moving forward, we believe it may be beneficial to have either the hearing officer or the Board consider the use of concurrent mediation or the appointment of a master in dealing with the procedural and/or substantive issues during the contested case hearing.

Thank you for your time and consideration of this matter.

Respectfully submitted,



Ian L. Sandison  
Tim Lui-Kwan  
Attorneys for University of Hawai'i at Hilo

cc: Richard N. Wurdeman

August 27, 2004

The Honorable Les Ihara, Jr.  
State Senator, Ninth District  
State Capitol, Room 217  
Honolulu, Hawaii 96813

The Honorable Peter T. Young  
Chairperson, Board of Land and Natural Resources  
P.O. Box 621  
Honolulu, Hawaii 96809

Re: Briefing on Contested Cases and Executive Session to Protect Privacy

Dear Senator Ihara and Chairperson Young:

On January 14, 2004, Senator Les Ihara, Jr. asked the Office of Information Practices ("OIP") to investigate possible violations of the Sunshine Law, part I of chapter 92, Hawaii Revised Statutes ("HRS"), by the Board of Land and Natural Resources ("Board"). Senator Ihara's request is based upon an article from the January 2004 issue of Environment Hawaii, entitled "Odd Executive Sessions," which reported two potential violations of the Sunshine Law during and after the Board's December meeting.

OIP Op. Ltr. No. 04-14

**EXHIBIT 1**

### **ISSUES PRESENTED**

- I. Is a briefing on contested cases by a board's attorney and other staff part of that board's exercise of its adjudicatory functions and, therefore, not subject to the Sunshine Law?
- II. May a board hold an executive session to permit an alleged violator's attorney to present information regarding personal problems of the alleged violator because the alleged violation "requires the consideration of information that must be kept confidential pursuant to a state or federal law," specifically, the privacy provision of the Hawaii Constitution?

### **BRIEF ANSWERS**

- I. Yes. Even under a narrow reading of the term "adjudicatory functions," a staff briefing for a board regarding pending contested cases before that board is an adjudicatory function exercised by that board and thus not subject to the Sunshine Law.
- II. No. When a board is charged with taking action regarding violations of state law, if an alleged violator wishes to offer information about personal problems as a defense or mitigating factor for the alleged violation, then the public has a strong interest in knowing the information that was presented to the board. It is OIP's opinion that the privacy provision of the Hawaii Constitution does not require a board to keep such information confidential. Thus, a Board may not hold an executive meeting to receive information about an alleged violator's personal problems in confidence.

### **FACTS**

In January, 2004, Environment Hawaii reported that the Board had convened five executive meetings and questioned the propriety of two of the meetings. The first alleged violation involves a closed meeting between the Board, Department of Land and Natural Resources staff, and a deputy attorney general, for which no public notice was given. Ms. Teresa Dawson, the article's author, was later told by a staff member that the meeting had been a briefing for the board on specific contested cases.

The Honorable Les Ihara, Jr.  
The Honorable Peter T. Young  
August 27, 2004  
Page 3

The second potential violation involves an executive session for which no purpose was publicly stated, and which did not appear to fall under one of the executive session purposes listed in section 92-5, HRS. According to Ms. Dawson, during the December meeting the Board voted to go into an unanticipated executive session on item D-14 to discuss legal issues relating to alleged violations with the alleged violator's attorney, Mr. John Carroll. Ms. Dawson's transcription indicated that the Board did not state the purpose listed in section 92-5, HRS, for going into executive session:

Land Division administrator Deirdre Mamiya: The partnership owns the parcel this occurred on...Our staff was talking to the family members, they have no control over Mr. Andrade....  
McCrory: They have no control over him?...Let them go after Mr. Andrade.  
John Carroll: I really would like to request an executive session for this issue if you don't mind. Unless that's too time consuming. I brought file copy which would answer your questions....  
Mamiya: .... Normally we would have run this through HOAPS. It was just because Mr. [Alfred] Andrade - there are certain circumstances which they [members of the Alfred J. Andrade Ltd. Partnership] do not want to make public about Mr. Andrade and how they are handling that situation.  
Kaua'i board member Lynn McCrory: I move we go into executive session.  
At-Large member Tim Johns: Seconded.  
Chair Peter Young: All those in favor?  
All: Aye.  
Young: We'll be back shortly.

## DISCUSSION

### **I. SUNSHINE LAW EXCEPTION FOR ADJUDICATORY FUNCTIONS**

The Sunshine Law requires a board to provide notice of all meetings. Haw. Rev. Stat. § 92-7(a) (Supp. 2003). However, it is the Board's contention that the briefing on contested cases was not subject to the Sunshine Law's notice requirements, because it fell under the exception to the Sunshine Law created by

The Honorable Les Ihara, Jr.  
The Honorable Peter T. Young  
August 27, 2004  
Page 4

section 92-6, HRS, for “adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9.” According to the Board, there was a briefing between the Board and its counsel, “related to contested cases before the Board.” Ms. Dawson’s account in her article (on which this request for investigation was based) likewise states that the briefing was by the Board’s staff and deputy attorney general, “on contested cases. . . .”

Thus, the question presented is whether a briefing of the board by its staff and attorney, regarding a contested case before the board, is part of that board’s exercise of its adjudicatory functions. The Sunshine Law requires a liberal construction of the law in favor of public access and a strict construction against closed meetings. Haw. Rev. Stat. § 92-1(1) and (2) (1993). OIP must therefore use a narrow interpretation of what constitutes an adjudicatory function when determining whether such a briefing is an adjudicatory function.

The Hawaii Supreme Court has applied the adjudicatory function exception in the specific context of a board’s closed deliberations, but has not spoken regarding whether a briefing by staff is an adjudicatory function. See Chang v. Planning Commission, 64 Haw. 431, 442-443, 643 P. 2d 55, 63-64 (1982).<sup>1</sup> The Senate Judiciary Committee report regarding section 92-6, HRS, provides some additional guidance:

Quasi-judicial boards in the exercise of adjudicatory functions are . . . specifically exempted because closed deliberation is traditional in quasi-judicial proceedings. Your Committee sees no objection to maintaining this practice, as availability of procedural safeguards, transcripts, written decisions, and the appellate process, all work to permit adequate public scrutiny as well as insure fairness and the required observance of constitutional rights.

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<sup>1</sup> In another case involving section 92-6, HRS, Outdoor Circle v. Land Use Commission, 4 Haw. App. 633, 675 P. 2d 784 (1983), the court reviewed actions by the Land Use Commission, to which by statute the Sunshine Law “shall apply to require open deliberation of [its] adjudicatory functions.” Haw. Rev. Stat. § 92-6(b) (1993). Because the statute required that the Land Use Commission’s adjudicatory functions be conducted openly, the court explicitly used a liberal construction of the statute to determine that the adoption of conclusions of law were part of the board’s adjudicatory functions. Outdoor Circle, *supra*, at 4 Haw. App. 641-2, 675 P. 2d 790-1. As the term “adjudicatory functions” must be strictly construed for other boards (for which the Sunshine Law does not apply to adjudicatory functions), the Outdoor Circle opinion offers only limited guidance here.



The Honorable Les Ihara, Jr.  
The Honorable Peter T. Young  
August 27, 2004  
Page 5

Senate Stand. Comm. Rep. No. 878, 8<sup>th</sup> Haw. Leg., 1<sup>st</sup> Sess., S.J. 1177, 1178 (1975). Although the only specific type of contested case activity mentioned as being traditionally closed is deliberation, the report also indicates the Committee's belief that the contested case process as a whole includes sufficient safeguards of the public interest to make application of the Sunshine Law unnecessary. We further note that, even if a briefing takes place before the hearing on a contested case, board members may discuss some aspect of the case during the briefing: it is impracticable to draw a bright line between the briefing a board's staff and attorney provides it and the board's own deliberation regarding the merits of a case.

Although the legislature clearly had closed deliberations in mind as a reason for the exception, it did not limit the exception to a board's deliberations, as statutes in some other states do.<sup>2</sup> Considering that the exception in Hawaii law is not limited to deliberations and considering as well the legislature's belief that the contested case process as a whole includes sufficient safeguards for the public interest, OIP concludes that, even under a narrow reading of the term "adjudicatory functions," a staff briefing for a board regarding pending contested cases before that board is part of the adjudicatory function exercised by that board and thus not subject to the Sunshine Law.

## **II. CONSTITUTIONAL RIGHT TO PRIVACY AS BASIS FOR EXECUTIVE MEETING**

In the second incident brought to OIP's attention, the Board failed to announce the purpose of an executive session before going into executive session. The Board's reason for closing the meeting was apparently to permit an alleged violator's attorney to present sensitive information regarding the alleged violator, as a mitigating factor to influence the Board's decision regarding an alleged violation. The Board has represented that it agreed to receive the information in an

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<sup>2</sup> See Kennedy v. Upper Milford Township Zoning Hearing, 575 Pa. 105 at 131 n.33, 834 A. 2d 1104 at 1120 n. 33, (quoting state statutes with an open meetings exception for quasi-judicial deliberations, including Alaska Stat. § 44.62.310(d)(1) (1980) (exempting quasi-judicial bodies "when holding a meeting solely to make a decision in an adjudicatory proceeding"); Kan. Stat. § 75-4318(f)(1) ("(f) The provisions of the open meetings law shall not apply: (1) To any administrative body that is authorized by law to exercise quasi-judicial functions when such body is deliberating matters relating to a decision involving such quasi-judicial functions"); Or. Rev. Stat. § 192.690(a) ("shall not apply to the deliberations of . . . state agencies conducting hearings on contested cases"); W. Va. Code § 6-9A-2(4) (definition of "meeting" excludes "(A) Any meeting for the purpose of making an adjudicatory decision in any quasi-judicial, administrative or court of claims proceeding.")) (Emphases added).

executive meeting to avoid potential embarrassment or distress to the alleged violator or his family by the public disclosure of the information.

**A. Announcement of Executive Session Purpose**

A board cannot go into executive session without making a public announcement of the reason for holding the executive session. Haw. Rev. Stat. § 92-4 (1993). Accordingly, the procedure employed by the Board in convening the executive meeting at issue was not in compliance with the statutory requirements. OIP reminds the Board that before convening an executive meeting it must publicly announce its reasons for closing the meeting. See id. The only purposes for which a board may go into executive session are those listed in section 92-5(a), HRS:

A board may hold a meeting closed to the public pursuant to section 92-4 for one or more of the following purposes:

- (1) To consider and evaluate personal information relating to individuals applying for professional or vocational licenses cited in section 26-9 or both;
- (2) To consider the hire, evaluation, dismissal, or discipline of an officer or employee or of charges brought against the officer or employee, where consideration of matters affecting privacy will be involved; provided that if the individual concerned requests an open meeting, an open meeting shall be held;
- (3) To deliberate concerning the authority of persons designated by the board to conduct labor negotiations or to negotiate the acquisition of public property, or during the conduct of such negotiations;
- (4) To consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities;
- (5) To investigate proceedings regarding criminal misconduct;
- (6) To consider sensitive matters related to public safety or security;
- (7) To consider matters relating to the solicitation and acceptance of private donations; and

- (8) To deliberate or make a decision upon a matter that requires the consideration of information that must be kept confidential pursuant to a state or federal law, or a court order.

Haw. Rev. Stat. § 92-5(a) (Supp. 2003). A board may not deliberate or make a decision in executive session on “matters not directly related to” the section 92-5(a), HRS, purposes. Haw. Rev. Stat. § 92-5(b) (Supp. 2003). Paragraph (4) of section 92-5(a), HRS, which allows an executive session to consult with the board’s attorney, protects a board’s ability to consult in confidence with its own legal counsel. See OIP Op. Ltr. No. 03-12 at 7-10 (July 14, 2003). It does not apply to a board’s consultation with the attorney for another party.

In response to a letter from OIP regarding the executive session with no announced purpose, the Board stated that the executive session with the alleged violator’s attorney was justified by paragraph 92-5(a)(8), HRS, on the theory that Hawaii’s constitutional privacy protection<sup>3</sup> required the Board to keep confidential the information about the alleged violator’s personal problems. When a matter before a board requires the board to consider information whose disclosure would violate Hawaii’s constitution, then the board may properly hold an executive session under section 92-5(a)(8), HRS. The question, however, is whether disclosure of the information at issue here would have violated Hawaii’s constitutional privacy protection as the Board argues.

## **B. Constitutional Right to Privacy**

The Board argues, correctly, that highly personal and intimate information is typically private. The Board does not specify what the information presented to it was, beyond stating that it related to personal problems of the alleged violator, but we will assume that it was in fact highly personal and intimate information that would carry a significant privacy interest. Looking by analogy to the balance of the public access interest against an individual’s significant privacy interest in the context of the Uniform Information Practices Act (Modified), chapter 92F, HRS,<sup>4</sup> the

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<sup>3</sup> “The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.” Haw. Const. Art. I, § 6.

<sup>4</sup> The balance in the UIPA between “the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy,” is explicitly based on a “recognition of the right of the people to privacy, as embodied in section 6 and section 7 of the Constitution of the State of Hawaii.” Haw. Rev. Stat. § 92F-2 (1993). OIP therefore agrees with the Board

The Honorable Les Ihara, Jr.  
The Honorable Peter T. Young  
August 27, 2004  
Page 8

Board argues that the public interest here is not high because the alleged violator was not a public employee and was a private citizen. Thus, it is the Board's contention that public disclosure of this information would be a violation of the alleged violator's right to privacy, so the Hawaii Constitution required the board to receive the information in confidence notwithstanding the Sunshine Law.

However, in arguing that the public access interest in the information is minimal, the Board entirely fails to address the fact that this information was being provided by the alleged violator's attorney as part of his defense to an alleged violation of state law. The public interest in the fair and even-handed application of the law is so strong that even in the absence of a specific statute requiring openness (such as the Sunshine Law), open trials are the societal norm. "[S]o deeply ingrained has been our traditional mistrust for secret trials . . . that the general policy of open trials has become firmly embedded in our system of jurisprudence." Gannett Pacific Corp. v. Richardson, 59 Haw. 224, 228, 580 P. 2d 49, 53-54 (1978) (citation omitted), quoted in State v. Ortiz, 91 Haw. 181, 190, 981 P. 2d 1127, 1136 (Haw. Sup. Ct. 1999).

As many courts have stated, the public interest in the fair application of the law is served by public access to legal proceedings. E.g. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 508, 104 S. Ct. 819, 823, 78 L. Ed. 2d 629, 638 (1984) ("[c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569-571 (1980), quoted in Press-Enterprise, supra, 464 U.S. 501, 508, 104 S. Ct. 819, 823, 78 L. Ed. 2d 629, 638 (regarding the public interest in open trials, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing"); Gannett, supra, at 59 Haw. 228, 580 P. 2d 54 (citations omitted) ("while the defendant is entitled as of right to a public trial, he is not entitled as of right to a private trial"); State v. Hashimoto, 47 Haw. 185, 200, 389 P. 2d 146, 155 (1963) quoted in Gannett, supra, (openness of court proceedings "serves as a safeguard of the integrity of our courts").

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that the balance between individual privacy and public access struck by the UIPA is an appropriate way to analyze whether the information falls within Hawaii's constitutional right to privacy and be considered in an executive meeting.

The Honorable Les Ihara, Jr.  
The Honorable Peter T. Young  
August 27, 2004  
Page 9

We see no reason that the public access interest in governmental application of state laws would be lessened when those laws are applied in the course of a board meeting subject to the Sunshine Law (which itself requires open meetings) rather than a judicial setting. In a judicial setting, an alleged violator cannot close the courtroom because he wishes to present a defense that includes embarrassing personal information. Similarly, when a board is charged with taking action regarding violations of state law, if an alleged violator offers information about personal problems as a defense or mitigating factor for the alleged violation, then the public has a strong interest in knowing the information that the board had before it in making a decision. Based on the analogy to the UIPA's balance between privacy and the public access interest, it is OIP's opinion that the public access interest outweighs an individual's significant privacy interest in such information, and therefore the privacy provision of the Hawaii Constitution does not require a board to keep such information confidential. Thus, it is OIP's opinion that the Sunshine Law did not permit the Board to hold an executive meeting to receive information about the alleged violator's personal problems in confidence.

### CONCLUSION

Section 92-6, HRS, provides an exception to the Sunshine Law for "adjudicatory functions exercised by a board and governed by sections 91-8 and 91-9." Even under a narrow reading of the term "adjudicatory functions," a staff briefing for a board regarding pending contested cases before that board is an adjudicatory function exercised by that board and thus not subject to the Sunshine Law. The Board thus did not violate the Sunshine Law through its closed, unannounced briefing of the Board by its staff and attorney.

With respect to its executive session to allow an alleged violator's attorney to present information regarding the alleged violator's personal problems, the Board violated the Sunshine Law in two ways. First, the Board failed to publicly announce the reason for holding the executive session, as required by section 92-4, HRS. Second, the Board's reason for holding the executive session was not a permitted purpose listed in section 92-5(a), HRS. The right to privacy under the Hawaii Constitution does not require a board that is considering an alleged violation of state law to keep information about the alleged violator's personal

The Honorable Les Ihara, Jr.  
The Honorable Peter T. Young  
August 27, 2004  
Page 10

problems confidential, when that information is presented in defense of the alleged violator. Thus, paragraph 92-5(a)(8) does not allow a Board to hold an executive meeting to receive such information in confidence.

Very truly yours,

Jennifer Z. Brooks  
Staff Attorney

APPROVED:

Leslie H. Kondo  
Director

JZB:cly

cc: Linda L.W. Chow, Esq.  
Ms. Teresa Dawson

# Notices

521-9111

DAY 521-9111

## NOTICE TO ATTORNEYS INTERESTED IN PROVIDING LEGAL SERVICES TO THE DEPARTMENT OF LAND AND NATURAL RESOURCES AS A HEARING OFFICER IN THE THIRTY METER TELESCOPE COUP PERMIT CONTESTED CASE (Pursuant to §103D-304, HRS)

In anticipation of the need for the Board of Land and Natural Resources to hold a contested case hearing on In Re Petitions Requesting a Contested Case Hearing Re Conservation District Use Permit (CDUP) for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Kahohe Maui, Hamakua District, Island of Hawaii, TMK (3) 4-4-015-009, the Department of Land and Natural Resources now seeks qualified applicants to provide professional legal services as a hearing officer in this potential case which is pending a remand to the Board by the Third Circuit Court of the State.

### Qualifications

An applicant must possess the following basic qualifications:

- 1) Being an attorney licensed to practice law in the State of Hawaii and in good standing;
- 2) Being able to serve with strict impartiality and no conflicts of interest or appearance of conflict;
- 3) Being available to devote a substantial amount of time in the next six to twelve months; and
- 4) Willing to accept the prevailing charge rate relevant to the professional services as a hearing officer, as determined by the Department.

Other desirable qualifications include civil litigation experience, practice in administrative law and process, familiarity with government proceedings and procedures, and knowledge of the Hawaii Revised Statutes and Hawaii Administrative Rules administered by the Department.

### Submission Requirements

Qualified parties interested in being considered for selection are invited to submit a letter of interest with a curriculum vitae or resume to:

Department of Land and Natural Resources  
Attn: Administrative Proceedings Office  
1151 Punchbowl Street, Room 130  
Honolulu, Hawaii 96813  
Facsimile: (808) 587-0390  
E-Mail: DLNR.CO.APO@HAWAII.GOV

Applicants from the same company or law firm must submit separate applications to the Department. Applications may be submitted by mail, facsimile or electronic mail. The Department will not be responsible for lost or misdirected mails.

All submittals must be received by the Department or postmarked by Tuesday, February 8, 2016, 4:30 p.m. to be considered.  
(SAB41140 1/29, 1/30, 1/31/16)



(<http://dlnr.hawaii.gov>)

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04/01/16 – DLNR Announces Appointment Of Hearings Officer For Mauna Kea Contested Case Hearing

## 04/01/16 – DLNR ANNOUNCES APPOINTMENT OF HEARINGS OFFICER FOR MAUNA KEA CONTESTED CASE HEARING

Posted on Apr 1, 2016 in News Releases  
(<http://dlnr.hawaii.gov/blog/category/news/>)

### DEPARTMENT OF LAND AND NATURAL RESOURCES News Release

DAVID Y. IGE  
GOVERNOR

SUZANNE D. CASE  
CHAIRPERSON

For Immediate News Release April 1, 2016

### DLNR ANNOUNCES APPOINTMENT OF HEARINGS OFFICER FOR MAUNA KEA CONTESTED CASE HEARING

HONOLULU – The Department of Land and Natural Resources (DLNR) announced today that retired Hawaii island circuit court judge Riki May Amano (Ret.) has been selected as the hearings officer to conduct the Mauna Kea contested case hearing relating to the application for the construction of the Thirty Meter Telescope. DLNR Chairperson Suzanne Case issued a minute order to the contested case parties today announcing Judge Amano's selection.

Judge Amano was selected pursuant to Hawaii Revised Statutes section 103D-304. HRS 103D-304 requires DLNR to assemble and vet a list of applicants. The list is reviewed by a selection committee, which ranks at least three candidates. The DLNR Chairperson then negotiates a contract with the first ranked person. If the DLNR Chairperson is unable to successfully negotiate a contract with the first ranked person, then he or she attempts to negotiate a contract with the next ranked person. In this case, Chairperson Case was able to successfully negotiate a contract with Judge Amano as the first ranked applicant of the selection committee.

**EXHIBIT 3**



The selection committee consisted of:

- James Duffy, Associate Justice of the Hawaii Supreme Court (Ret.);
- Stella Kam, Deputy Attorney General;
- Christopher Yuen, Member of the Board of Land and Natural Resources (BLNR).

Any comments on and objections to this appointment shall be filed no later than April 15, 2016, 4:30 p.m. at DLNR Administrative Proceedings Office, 1151 Punchbowl St., Rm. 130, Honolulu, Hawaii 96813.

Judge Amano will determine the schedule for the contested case hearing.

Judge Amano served as a judge in the district and circuit courts of the Third Judicial Circuit, State of Hawaii from February 1992 until her retirement in April 2003. Judge Amano has been recognized annually as a Best Lawyer in America/Hawaii from 2007 to the present. Judge Amano was born and raised in Hilo; she currently resides in Honolulu. She completed her undergraduate education in 1976 with a BA degree in Political Science and obtained her Juris Doctor degree from the William S. Richardson School of Law, University of Hawaii in 1979. Prior to her appointment to the bench, Judge Amano was a deputy attorney general assigned to the Department of Land and Natural Resources, Transportation and Labor and Industrial Relations; and in private practice from 1981 until 1991.

# # #

#### **Media Contact:**

Deborah Ward  
DLNR Communications specialist  
Phone: (808) 587-0320

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DAVID Y. IGE  
GOVERNOR



DOUGLAS S. CHIN  
ATTORNEY GENERAL

RUSSELL A. SUZUKI  
FIRST DEPUTY ATTORNEY GENERAL

**STATE OF HAWAII**  
**DEPARTMENT OF THE ATTORNEY GENERAL**  
425 QUEEN STREET  
HONOLULU, HAWAII 96813  
(808) 586-1500

April 14, 2016

Richard Naiwieha Wurdeman, Esq.  
Pauahi Tower, Suite 720  
1003 Bishop Street  
Honolulu, HI 96813

Subject: Mauna Kea Anaina Hou, et al., v. Board of Land & Natural  
Resources, et al.; Civ. No. 13-1-0349; SCAP-14-0873 DLNR  
Docket No. HA-11-05 – UH/TMT CDUP Application/HA: 3568,  
Case No. BLNR CC-16-002

Dear Mr. Wurdeman:

This is in response to your letter dated April 4, 2016. You asked for copies of records in connection with the selection of Judge (Ret.) Riki May Amano as the hearing officer for In Re Petitions Requesting a Contested Case Hearing Re Conservation District Use Permit for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Kaohe Mauka, Hamakua District, Island of Hawai'i, TMK (3) 4-4-015:009.

A copy of the contract with Judge Amano is enclosed. Tax identification numbers have been redacted as protected information under section 92F-13(1), (3), and (4), Hawaii Revised Statutes (HRS). Information concerning the contract amount, Judge Amano's hourly rate, and the negotiated changes to the General Conditions have also been redacted and will not be disclosed at this point in time because disclosure would compromise the State's bargaining position if Judge Amano is removed and the State is required to negotiate with the second and/or third ranked applicants. Upon Judge Amano's commencement of the administrative hearing in this case, the contract amount, her hourly rate, and the negotiated changes to the General Conditions will be disclosed.

Copies of other records you requested in your letter, namely the list of qualified persons, and the statements of qualifications submitted by the qualified persons, except the portions which were requested to be kept confidential under section 3-122-58, Hawai'i Administrative Rules (HAR), will be provided to you when the administrative hearing commences. We recognize that these records are open to public inspection under section 3-122-63(b), HAR, "[a]fter the contract is awarded." However, the Board of Land and Natural Resource's (BLNR) Minute Order allows for an objection period which could result in the removal of Judge Amano and the need to negotiate with the second or third ranked applicant. Because the premature disclosure of the identities of the second and third ranked applicants could jeopardize the State's position in negotiations with these individuals and result in the frustration of a legitimate government function, the requested records will be disclosed upon the selected hearing officer's commencement of the administrative hearing in this case.<sup>1</sup>

Regarding your request for the criteria used by the Selection Committee, we direct your attention to section 103D-304(e), HRS. That provision sets forth the selection criteria ("in descending order of importance") that the Selection Committee was required to use in selecting the hearing officer.

Your letter also questioned why BLNR member Christopher Yuen was not precluded from sitting on the Selection Committee pursuant to section 3-122-69(b), HAR. That provision states that "[d]eputy directors or equivalent appointed positions shall not serve on review or selection committees." (emphasis added).

Under general rules of statutory construction, "[t]he words of a law are generally to be understood in their most known and usual signification. . . ." Section 1-14, HRS. Moreover, the Hawaii Supreme Court has stated that the "rules of statutory construction require us to reject an interpretation of [a] statute [or an ordinance] that renders any part of the statutory language a nullity." *Coon v. City & County of Honolulu*, 98 Hawai'i 233, 250, 47 P.3d 348, 366 (2002), citing *Potter v. Hawai'i Newspaper Agency*, 89 Hawai'i 411, 423-24, 974 P.2d 51, 63-64 (1999) (citations omitted); *Konno v. County of Hawai'i*, 85 Hawai'i 61, 71, 937 P.2d 397, 407 (1997).

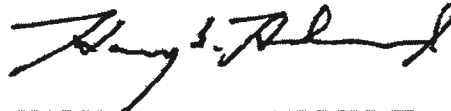
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<sup>1</sup> Under the Uniform Information Practices Act, chapter 92F, HRS (UIPA), government purchasing information is public "except to the extent prohibited by section 92F-13." Section 92F-12(a)(3), HRS. One of the UIPA exceptions contained in section 92F-13 allows agencies to withhold public access to information which would, if disclosed, result in the "frustration of a legitimate government function." Section 92F-13(3), HRS. We emphasize, however, that our assertion of the UIPA's Frustration Exception to prevent the premature disclosure of the requested records is only temporary, i.e. during the period of time in which it is necessary to protect the State's position in negotiations with the second and/or third ranked applicants.

Richard Naiwieha Wurdeman, Esq.  
April 14, 2016  
Page 3

Applying the rules of statutory construction, the "appointed position" referred to in section 3-122-69(b), HAR, must be the "equivalent" to a deputy director position. We have not found any legal authority stating or even implying that board and commission members are the equivalent to deputy directors. The prohibition of deputy directors or equivalent appointed positions from sitting on selection committees is presumably to prevent the department director, through the director's deputy, from controlling the selection and the order of the top three ranked qualified applicants. We note that, unlike deputy directors and equivalent appointed positions who are tasked with supporting the department directors, board and commission members are independent and not subject to the control or direction of the department director. The BLNR members are not under the control or direction of the BLNR Chair. Accordingly, we do not believe that section 3-122-69(b), HAR, prohibited BLNR member Christopher Yuen from sitting on the Selection Committee for the procurement of a hearing officer in this case.

Very truly yours,

A handwritten signature in black ink, appearing to read "Harvey E. Henderson, Jr.", written in a cursive style.

HARVEY E. HENDERSON, JR.  
Deputy Attorney General

HEH:dyi

Enclosure

cc: Ian L. Sandison, Esq. (w/encl.)



# STATE OF HAWAII

## CONTRACT FOR PROFESSIONAL SERVICES

This Contract, executed on the respective dates indicated below, is effective as of  
March 31, 2016, between Board of Land and Natural Resources,  
(Insert name of state department, agency, board or commission)  
 State of Hawaii ("STATE"), by its Chairperson,  
(Insert title of person signing for State)  
 (hereafter also referred to as the HEAD OF THE PURCHASING AGENCY or designee ("HOPA")),  
 whose address is 1151 Punchbowl Street, Room 130, Honolulu, Hawaii 96813  
and Riki May Amano  
 ("CONTRACTOR"), a Sole Proprietorship  
(Insert corporation, partnership, joint venture, sole proprietorship or other legal form of the Contractor)  
 under the laws of the State of Hawaii, whose business address and federal  
 and state taxpayer identification numbers are as follows: 1003 Bishop Street, Pauahi Tower, Suite 1155,  
Honolulu, Hawaii 96813; FEIN/SSN: [REDACTED]; State of Hawaii Tax ID: [REDACTED]

### RECITALS

A. The STATE desires to retain and engage the CONTRACTOR to provide the services described in this Contract and its attachments, and the CONTRACTOR is agreeable to providing said services.

B. This Contract is for professional services as defined in section 103D-104, Hawaii Revised Statutes ("HRS").

C. Money is available to fund this Contract pursuant to:  
 (1) Act 32, Session Laws of Hawaii 1982, LNR-101, Special Land and Development Fund  
(Identify state source)

or (2) N/A  
(Identify federal source)

or both, in the following amounts: State \$ [REDACTED]  
 Federal \$ N/A

D. Pursuant to §171-6(11) Hawaii Revised Statutes, the STATE  
(Legal authority to enter into this Contract)  
 is authorized to enter into this Contract.

NOW, THEREFORE, in consideration of the promises contained in this Contract, the STATE and the CONTRACTOR agree as follows:

1. Scope of Services. The CONTRACTOR shall, in a proper and satisfactory manner as determined by the STATE, provide all the services set forth in Attachment-S1, which is made a part of this Contract.

2. Term of Contract. This Contract starts on March 31, 2016  
 and ends on June 30, 2017 with two option(s) to extend  
(Insert no. of options)  
 for six months each.  
(Insert no. of mos. or yrs.)

3. Compensation. The CONTRACTOR shall be compensated for services rendered and costs incurred under this Contract for a total amount not to exceed [REDACTED]  
DOLLARS

(\$ [REDACTED]), including approved costs incurred and taxes, according to the Compensation and Payment Schedule set forth in Attachment-S2, which is made a part of this Contract.

4. Time of Performance. The services or goods required of the CONTRACTOR under this Contract shall be performed and completed in accordance with the Time of Performance set forth in Attachment-S3, which is made a part of this Contract.

5. Standards of Conduct Declaration. The Standards of Conduct Declaration by the CONTRACTOR is attached to and made a part of this Contract.

6. Other Terms and Conditions. The General Conditions and any Special Conditions are attached to and made a part of this Contract. In the event of a conflict between the General Conditions and the Special Conditions, the Special Conditions shall control.


7. Liquidated Damages. Liquidated damages shall be assessed in the amount of zero DOLLARS

(\$ [REDACTED]) per day, in accordance with paragraph 9 of the General Conditions.

8. Notices. Any written notice required to be given by a party to this Contract shall be (a) delivered personally, or (b) sent by United States first class mail, postage prepaid. Notice to the STATE shall be sent to the HOPA'S address indicated in this Contract. Notice to the CONTRACTOR shall be sent to the CONTRACTOR'S address indicated in this Contract. A notice shall be deemed to have been received three (3) days after mailing or at the time of actual receipt, whichever is earlier. The CONTRACTOR is responsible for notifying the STATE in writing of any change of address.

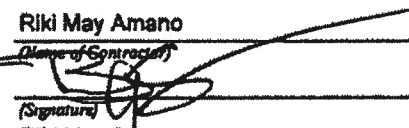
IN VIEW OF THE ABOVE, the parties execute this Contract by their signatures, on the dates below, to be effective as of the date first above written.

STATE

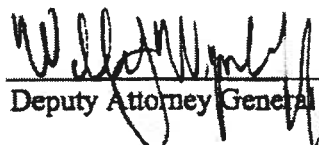
  
(Signature)  
Suzanne D. Case  
(Print Name)  
Chairperson, Board of Land and Natural Resources  
(Print Title)  
3/31/2016  
(Date)

CORPORATE SEAL  
(If available)

CONTRACTOR

Riki May Amano  
(Name of Contractor)  
  
(Signature)  
Riki May Amano  
(Print Name)  
JUDGE (RBT.)  
(Print Title)  
3/31/2016  
(Date)

APPROVED AS TO FORM:

  
Deputy Attorney General

\* Evidence of authority of the CONTRACTOR'S representative to sign this Contract for the CONTRACTOR must be attached.

## GENERAL CONDITIONS

### Table of Contents

	<u>Page(s)</u>
1. Coordination of Services by the STATE.....	2
2. Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities.....	2
3. Personnel Requirements .....	3
4. Nondiscrimination .....	3
5. Conflicts of Interest .....	3
6. Subcontracts and Assignments .....	3
7. Indemnification and Defense.....	4
8. Cost of Litigation .....	4
9. Liquidated Damages .....	4
10. STATE'S Right of Offset.....	4
11. Disputes .....	4
12. Suspension of Contract .....	4
13. Termination for Default.....	5
14. Termination for Convenience .....	6
15. Claims Based on the Agency Procurement Officer's Actions or Omissions .....	8
16. Costs and Expenses .....	8
17. Payment Procedures; Final Payment; Tax Clearance .....	9
18. Federal Funds .....	9
19. Modifications of Contract.....	9
20. Change Order.....	10
21. Price Adjustment .....	11
22. Variation in Quantity for Definite Quantity Contracts .....	11
23. Changes in Cost-Reimbursement Contract.....	11
24. Confidentiality of Material .....	12
25. Publicity.....	12
26. Ownership Rights and Copyright .....	12
27. Liens and Warranties .....	12
28. Audit of Books and Records of the CONTRACTOR.....	13
29. Cost or Pricing Data .....	13
30. Audit of Cost or Pricing Data .....	13
31. Records Retention.....	13
32. Antitrust Claims.....	13
33. Patented Articles.....	13
34. Governing Law .....	14
35. Compliance with Laws .....	14
36. Conflict between General Conditions and Procurement Rules .....	14
37. Entire Contract.....	14
38. Severability .....	14
39. Waiver .....	14
40. Pollution Control .....	14
41. Campaign Contributions.....	14
42. Confidentiality of Personal Information.....	14



## GENERAL CONDITIONS

1. **Coordination of Services by the STATE.** The head of the purchasing agency ("HOPA") (which term includes the designee of the HOPA) shall coordinate the services to be provided by the CONTRACTOR in order to complete the performance required in the Contract. The CONTRACTOR shall maintain communications with HOPA at all stages of the CONTRACTOR'S work, and submit to HOPA for resolution any questions which may arise as to the performance of this Contract. "Purchasing agency" as used in these General Conditions means and includes any governmental body which is authorized under chapter 103D, HRS, or its implementing rules and procedures, or by way of delegation, to enter into contracts for the procurement of goods or services or both.
2. **Relationship of Parties: Independent Contractor Status and Responsibilities, Including Tax Responsibilities.**
  - a. In the performance of services required under this Contract, the CONTRACTOR is an "independent contractor," with the authority and responsibility to control and direct the performance and details of the work and services required under this Contract; however, the STATE shall have a general right to inspect work in progress to determine whether, in the STATE'S opinion, the services are being performed by the CONTRACTOR in compliance with this Contract. Unless otherwise provided by special condition, it is understood that the STATE does not agree to use the CONTRACTOR exclusively, and that the CONTRACTOR is free to contract to provide services to other individuals or entities while under contract with the STATE.
  - b. The CONTRACTOR and the CONTRACTOR'S employees and agents are not by reason of this Contract, agents or employees of the State for any purpose, and the CONTRACTOR and the CONTRACTOR'S employees and agents shall not be entitled to claim or receive from the State any vacation, sick leave, retirement, workers' compensation, unemployment insurance, or other benefits provided to state employees.
  - c. The CONTRACTOR shall be responsible for the accuracy, completeness, and adequacy of the CONTRACTOR'S performance under this Contract. Furthermore, the CONTRACTOR intentionally, voluntarily, and knowingly assumes the sole and entire liability to the CONTRACTOR'S employees and agents, and to any individual not a party to this Contract, for all loss, damage, or injury caused by the CONTRACTOR, or the CONTRACTOR'S employees or agents in the course of their employment.
  - d. The CONTRACTOR shall be responsible for payment of all applicable federal, state, and county taxes and fees which may become due and owing by the CONTRACTOR by reason of this Contract, including but not limited to (i) income taxes, (ii) employment related fees, assessments, and taxes, and (iii) general excise taxes. The CONTRACTOR also is responsible for obtaining all licenses, permits, and certificates that may be required in order to perform this Contract.
  - e. The CONTRACTOR shall obtain a general excise tax license from the Department of Taxation, State of Hawaii, in accordance with section 237-9, HRS, and shall comply with all requirements thereof. The CONTRACTOR shall obtain a tax clearance certificate from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of the Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid and submit the same to the STATE prior to commencing any performance under this Contract. The CONTRACTOR shall also be solely responsible for meeting all requirements necessary to obtain the tax clearance certificate required for final payment under sections 103-53 and 103D-328, HRS, and paragraph 17 of these General Conditions.
  - f. The CONTRACTOR is responsible for securing all employee-related insurance coverage for the CONTRACTOR and the CONTRACTOR'S employees and agents that is or may be required by law, and for payment of all premiums, costs, and other liabilities associated with securing the insurance coverage.

- g. The CONTRACTOR shall obtain a certificate of compliance issued by the Department of Labor and Industrial Relations, State of Hawaii, in accordance with section 103D-310, HRS, and section 3-122-112, HAR, that is current within six months of the date of issuance.
  - h. The CONTRACTOR shall obtain a certificate of good standing issued by the Department of Commerce and Consumer Affairs, State of Hawaii, in accordance with section 103D-310, HRS, and section 3-122-112, HAR, that is current within six months of the date of issuance.
  - i. In lieu of the above certificates from the Department of Taxation, Labor and Industrial Relations, and Commerce and Consumer Affairs, the CONTRACTOR may submit proof of compliance through the State Procurement Office's designated certification process.
3. Personnel Requirements.
- a. The CONTRACTOR shall secure, at the CONTRACTOR'S own expense, all personnel required to perform this Contract.
  - b. The CONTRACTOR shall ensure that the CONTRACTOR'S employees or agents are experienced and fully qualified to engage in the activities and perform the services required under this Contract, and that all applicable licensing and operating requirements imposed or required under federal, state, or county law, and all applicable accreditation and other standards of quality generally accepted in the field of the activities of such employees and agents are complied with and satisfied.
4. Nondiscrimination. No person performing work under this Contract, including any subcontractor, employee, or agent of the CONTRACTOR, shall engage in any discrimination that is prohibited by any applicable federal, state, or county law.
5. Conflicts of Interest. The CONTRACTOR represents that neither the CONTRACTOR, nor any employee or agent of the CONTRACTOR, presently has any interest, and promises that no such interest, direct or indirect, shall be acquired, that would or might conflict in any manner or degree with the CONTRACTOR'S performance under this Contract.
6. Subcontracts and Assignments. The CONTRACTOR shall not assign or subcontract any of the CONTRACTOR'S duties, obligations, or interests under this Contract and no such assignment or subcontract shall be effective unless (i) the CONTRACTOR obtains the prior written consent of the STATE, and (ii) the CONTRACTOR'S assignee or subcontractor submits to the STATE a tax clearance certificate from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR'S assignee or subcontractor have been paid. Additionally, no assignment by the CONTRACTOR of the CONTRACTOR'S right to compensation under this Contract shall be effective unless and until the assignment is approved by the Comptroller of the State of Hawaii, as provided in section 40-58, HRS.
- a. Recognition of a successor in interest. When in the best interest of the State, a successor in interest may be recognized in an assignment contract in which the STATE, the CONTRACTOR and the assignee or transferee (hereinafter referred to as the "Assignee") agree that:
    - (1) The Assignee assumes all of the CONTRACTOR'S obligations;
    - (2) The CONTRACTOR remains liable for all obligations under this Contract but waives all rights under this Contract as against the STATE; and
    - (3) The CONTRACTOR shall continue to furnish, and the Assignee shall also furnish, all required bonds.
  - b. Change of name. When the CONTRACTOR asks to change the name in which it holds this Contract with the STATE, the procurement officer of the purchasing agency (hereinafter referred to as the "Agency procurement officer") shall, upon receipt of a document acceptable or satisfactory to the

Agency procurement officer indicating such change of name (for example, an amendment to the CONTRACTOR'S articles of incorporation), enter into an amendment to this Contract with the CONTRACTOR to effect such a change of name. The amendment to this Contract changing the CONTRACTOR'S name shall specifically indicate that no other terms and conditions of this Contract are thereby changed.

- c. Reports. All assignment contracts and amendments to this Contract effecting changes of the CONTRACTOR'S name or novations hereunder shall be reported to the chief procurement officer (CPO) as defined in section 103D-203(a), HRS, within thirty days of the date that the assignment contract or amendment becomes effective.
  - d. Actions affecting more than one purchasing agency. Notwithstanding the provisions of subparagraphs 6a through 6c herein, when the CONTRACTOR holds contracts with more than one purchasing agency of the State, the assignment contracts and the novation and change of name amendments herein authorized shall be processed only through the CPO's office.
- 7. Indemnification and Defense. The CONTRACTOR shall defend, indemnify, and hold harmless the State of Hawaii, the contracting agency, and their officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefore, arising out of or resulting from the acts or omissions of the CONTRACTOR or the CONTRACTOR'S employees, officers, agents, or subcontractors under this Contract. The provisions of this paragraph shall remain in full force and effect notwithstanding the expiration or early termination of this Contract.
  - 8. Cost of Litigation. In case the STATE shall, without any fault on its part, be made a party to any litigation commenced by or against the CONTRACTOR in connection with this Contract, the CONTRACTOR shall pay all costs and expenses incurred by or imposed on the STATE, including attorneys' fees.
  - 9. Liquidated Damages. When the CONTRACTOR is given notice of delay or nonperformance as specified in paragraph 13 (Termination for Default) and fails to cure in the time specified, it is agreed the CONTRACTOR shall pay to the STATE the amount, if any, set forth in this Contract per calendar day from the date set for cure until either (i) the STATE reasonably obtains similar goods or services, or both, if the CONTRACTOR is terminated for default, or (ii) until the CONTRACTOR provides the goods or services, or both, if the CONTRACTOR is not terminated for default. To the extent that the CONTRACTOR'S delay or nonperformance is excused under paragraph 13d (Excuse for Nonperformance or Delay Performance), liquidated damages shall not be assessable against the CONTRACTOR. The CONTRACTOR remains liable for damages caused other than by delay.
  - 10. STATE'S Right of Offset. The STATE may offset against any monies or other obligations the STATE owes to the CONTRACTOR under this Contract, any amounts owed to the State of Hawaii by the CONTRACTOR under this Contract or any other contracts, or pursuant to any law or other obligation owed to the State of Hawaii by the CONTRACTOR, including, without limitation, the payment of any taxes or levies of any kind or nature. The STATE will notify the CONTRACTOR in writing of any offset and the nature of such offset. For purposes of this paragraph, amounts owed to the State of Hawaii shall not include debts or obligations which have been liquidated, agreed to by the CONTRACTOR, and are covered by an installment payment or other settlement plan approved by the State of Hawaii, provided, however, that the CONTRACTOR shall be entitled to such exclusion only to the extent that the CONTRACTOR is current with, and not delinquent on, any payments or obligations owed to the State of Hawaii under such payment or other settlement plan.
  - 11. Disputes. Disputes shall be resolved in accordance with section 103D-703, HRS, and chapter 3-126, Hawaii Administrative Rules ("HAR"), as the same may be amended from time to time.
  - 12. Suspension of Contract. The STATE reserves the right at any time and for any reason to suspend this Contract for any reasonable period, upon written notice to the CONTRACTOR in accordance with the provisions herein.
    - a. Order to stop performance. The Agency procurement officer may, by written order to the CONTRACTOR, at any time, and without notice to any surety, require the CONTRACTOR to stop all or any part of the performance called for by this Contract. This order shall be for a specified

period not exceeding sixty (60) days after the order is delivered to the CONTRACTOR, unless the parties agree to any further period. Any such order shall be identified specifically as a stop performance order issued pursuant to this section. Stop performance orders shall include, as appropriate: (1) A clear description of the work to be suspended; (2) Instructions as to the issuance of further orders by the CONTRACTOR for material or services; (3) Guidance as to action to be taken on subcontracts; and (4) Other instructions and suggestions to the CONTRACTOR for minimizing costs. Upon receipt of such an order, the CONTRACTOR shall forthwith comply with its terms and suspend all performance under this Contract at the time stated, provided, however, the CONTRACTOR shall take all reasonable steps to minimize the occurrence of costs allocable to the performance covered by the order during the period of performance stoppage. Before the stop performance order expires, or within any further period to which the parties shall have agreed, the Agency procurement officer shall either:

- (1) Cancel the stop performance order; or
  - (2) Terminate the performance covered by such order as provided in the termination for default provision or the termination for convenience provision of this Contract.
- b. Cancellation or expiration of the order. If a stop performance order issued under this section is cancelled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the CONTRACTOR shall have the right to resume performance. An appropriate adjustment shall be made in the delivery schedule or contract price, or both, and the Contract shall be modified in writing accordingly, if:
- (1) The stop performance order results in an increase in the time required for, or in the CONTRACTOR'S cost properly allocable to, the performance of any part of this Contract; and
  - (2) The CONTRACTOR asserts a claim for such an adjustment within thirty (30) days after the end of the period of performance stoppage; provided that, if the Agency procurement officer decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this Contract.
- c. Termination of stopped performance. If a stop performance order is not cancelled and the performance covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop performance order shall be allowable by adjustment or otherwise.
- d. Adjustment of price. Any adjustment in contract price made pursuant to this paragraph shall be determined in accordance with the price adjustment provision of this Contract.

### 13. Termination for Default.

- a. Default. If the CONTRACTOR refuses or fails to perform any of the provisions of this Contract with such diligence as will ensure its completion within the time specified in this Contract, or any extension thereof, otherwise fails to timely satisfy the Contract provisions, or commits any other substantial breach of this Contract, the Agency procurement officer may notify the CONTRACTOR in writing of the delay or non-performance and if not cured in ten (10) days or any longer time specified in writing by the Agency procurement officer, such officer may terminate the CONTRACTOR'S right to proceed with the Contract or such part of the Contract as to which there has been delay or a failure to properly perform. In the event of termination in whole or in part, the Agency procurement officer may procure similar goods or services in a manner and upon the terms deemed appropriate by the Agency procurement officer. The CONTRACTOR shall continue performance of the Contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.
- b. CONTRACTOR'S duties. Notwithstanding termination of the Contract and subject to any directions from the Agency procurement officer, the CONTRACTOR shall take timely, reasonable, and

necessary action to protect and preserve property in the possession of the CONTRACTOR in which the STATE has an interest.

- c. Compensation. Payment for completed goods and services delivered and accepted by the STATE shall be at the price set forth in the Contract. Payment for the protection and preservation of property shall be in an amount agreed upon by the CONTRACTOR and the Agency procurement officer. If the parties fail to agree, the Agency procurement officer shall set an amount subject to the CONTRACTOR'S rights under chapter 3-126, HAR. The STATE may withhold from amounts due the CONTRACTOR such sums as the Agency procurement officer deems to be necessary to protect the STATE against loss because of outstanding liens or claims and to reimburse the STATE for the excess costs expected to be incurred by the STATE in procuring similar goods and services.
- d. Excuse for nonperformance or delayed performance. The CONTRACTOR shall not be in default by reason of any failure in performance of this Contract in accordance with its terms, including any failure by the CONTRACTOR to make progress in the prosecution of the performance hereunder which endangers such performance, if the CONTRACTOR has notified the Agency procurement officer within fifteen (15) days after the cause of the delay and the failure arises out of causes such as: acts of God; acts of a public enemy; acts of the State and any other governmental body in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, the CONTRACTOR shall not be deemed to be in default, unless the goods and services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit the CONTRACTOR to meet the requirements of the Contract. Upon request of the CONTRACTOR, the Agency procurement officer shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the CONTRACTOR'S progress and performance would have met the terms of the Contract, the delivery schedule shall be revised accordingly, subject to the rights of the STATE under this Contract. As used in this paragraph, the term "subcontractor" means subcontractor at any tier.
- e. Erroneous termination for default. If, after notice of termination of the CONTRACTOR'S right to proceed under this paragraph, it is determined for any reason that the CONTRACTOR was not in default under this paragraph, or that the delay was excusable under the provisions of subparagraph 13d, "Excuse for nonperformance or delayed performance," the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to paragraph 14.
- f. Additional rights and remedies. The rights and remedies provided in this paragraph are in addition to any other rights and remedies provided by law or under this Contract.

14. Termination for Convenience.

- a. Termination. The Agency procurement officer may, when the interests of the STATE so require, terminate this Contract in whole or in part, for the convenience of the STATE. The Agency procurement officer shall give written notice of the termination to the CONTRACTOR specifying the part of the Contract terminated and when termination becomes effective.
- b. CONTRACTOR'S obligations. The CONTRACTOR shall incur no further obligations in connection with the terminated performance and on the date(s) set in the notice of termination the CONTRACTOR will stop performance to the extent specified. The CONTRACTOR shall also terminate outstanding orders and subcontracts as they relate to the terminated performance. The CONTRACTOR shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated performance subject to the STATE'S approval. The Agency procurement officer may direct the CONTRACTOR to assign the CONTRACTOR'S right, title, and interest under terminated orders or subcontracts to the STATE. The CONTRACTOR must still complete the performance not terminated by the notice of termination and may incur obligations as necessary to do so.

- c. Right to goods and work product. The Agency procurement officer may require the CONTRACTOR to transfer title and deliver to the STATE in the manner and to the extent directed by the Agency procurement officer:

- (1) Any completed goods or work product; and
- (2) The partially completed goods and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing material") as the CONTRACTOR has specifically produced or specially acquired for the performance of the terminated part of this Contract.

The CONTRACTOR shall, upon direction of the Agency procurement officer, protect and preserve property in the possession of the CONTRACTOR in which the STATE has an interest. If the Agency procurement officer does not exercise this right, the CONTRACTOR shall use best efforts to sell such goods and manufacturing materials. Use of this paragraph in no way implies that the STATE has breached the Contract by exercise of the termination for convenience provision.

- d. Compensation.

- (1) The CONTRACTOR shall submit a termination claim specifying the amounts due because of the termination for convenience together with the cost or pricing data, submitted to the extent required by chapter 3-122, HAR, bearing on such claim. If the CONTRACTOR fails to file a termination claim within one year from the effective date of termination, the Agency procurement officer may pay the CONTRACTOR, if at all, an amount set in accordance with subparagraph 14d(3) below.
- (2) The Agency procurement officer and the CONTRACTOR may agree to a settlement provided the CONTRACTOR has filed a termination claim supported by cost or pricing data submitted as required and that the settlement does not exceed the total Contract price plus settlement costs reduced by payments previously made by the STATE, the proceeds of any sales of goods and manufacturing materials under subparagraph 14c, and the Contract price of the performance not terminated.
- (3) Absent complete agreement under subparagraph 14d(2) the Agency procurement officer shall pay the CONTRACTOR the following amounts, provided payments agreed to under subparagraph 14d(2) shall not duplicate payments under this subparagraph for the following:
  - (A) Contract prices for goods or services accepted under the Contract;
  - (B) Costs incurred in preparing to perform and performing the terminated portion of the performance plus a fair and reasonable profit on such portion of the performance, such profit shall not include anticipatory profit or consequential damages, less amounts paid or to be paid for accepted goods or services; provided, however, that if it appears that the CONTRACTOR would have sustained a loss if the entire Contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;
  - (C) Costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to subparagraph 14b. These costs must not include costs paid in accordance with subparagraph 14d(3)(B);
  - (D) The reasonable settlement costs of the CONTRACTOR, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the Contract and for the termination of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this Contract. The total sum to be paid the CONTRACTOR under this subparagraph shall not exceed the

total Contract price plus the reasonable settlement costs of the CONTRACTOR reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph 14d(2), and the contract price of performance not terminated.

- (4) Costs claimed, agreed to, or established under subparagraphs 14d(2) and 14d(3) shall be in accordance with Chapter 3-123 (Cost Principles) of the Procurement Rules.

15. Claims Based on the Agency Procurement Officer's Actions or Omissions.

- a. Changes in scope. If any action or omission on the part of the Agency procurement officer (which term includes the designee of such officer for purposes of this paragraph 15) requiring performance changes within the scope of the Contract constitutes the basis for a claim by the CONTRACTOR for additional compensation, damages, or an extension of time for completion, the CONTRACTOR shall continue with performance of the Contract in compliance with the directions or orders of such officials, but by so doing, the CONTRACTOR shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:
- (1) Written notice required. The CONTRACTOR shall give written notice to the Agency procurement officer:
- (A) Prior to the commencement of the performance involved, if at that time the CONTRACTOR knows of the occurrence of such action or omission;
- (B) Within thirty (30) days after the CONTRACTOR knows of the occurrence of such action or omission, if the CONTRACTOR did not have such knowledge prior to the commencement of the performance; or
- (C) Within such further time as may be allowed by the Agency procurement officer in writing.
- (2) Notice content. This notice shall state that the CONTRACTOR regards the act or omission as a reason which may entitle the CONTRACTOR to additional compensation, damages, or an extension of time. The Agency procurement officer, upon receipt of such notice, may rescind such action, remedy such omission, or take such other steps as may be deemed advisable in the discretion of the Agency procurement officer;
- (3) Basis must be explained. The notice required by subparagraph 15a(1) describes as clearly as practicable at the time the reasons why the CONTRACTOR believes that additional compensation, damages, or an extension of time may be remedies to which the CONTRACTOR is entitled; and
- (4) Claim must be justified. The CONTRACTOR must maintain and, upon request, make available to the Agency procurement officer within a reasonable time, detailed records to the extent practicable, and other documentation and evidence satisfactory to the STATE, justifying the claimed additional costs or an extension of time in connection with such changes.
- b. CONTRACTOR not excused. Nothing herein contained, however, shall excuse the CONTRACTOR from compliance with any rules or laws precluding any state officers and CONTRACTOR from acting in collusion or bad faith in issuing or performing change orders which are clearly not within the scope of the Contract.
- c. Price adjustment. Any adjustment in the price made pursuant to this paragraph shall be determined in accordance with the price adjustment provision of this Contract.

16. Costs and Expenses. Any reimbursement due the CONTRACTOR for per diem and transportation expenses under this Contract shall be subject to chapter 3-123 (Cost Principles), HAR, and the following guidelines:



- a. Reimbursement for air transportation shall be for actual cost or coach class air fare, whichever is less.
  - b. Reimbursement for ground transportation costs shall not exceed the actual cost of renting an intermediate-sized vehicle.
  - c. Unless prior written approval of the HOPA is obtained, reimbursement for subsistence allowance (i.e., hotel and meals, etc.) shall not exceed the applicable daily authorized rates for inter-island or out-of-state travel that are set forth in the current Governor's Executive Order authorizing adjustments in salaries and benefits for state officers and employees in the executive branch who are excluded from collective bargaining coverage.
17. Payment Procedures: Final Payment: Tax Clearance.
- a. Original invoices required. All payments under this Contract shall be made only upon submission by the CONTRACTOR of original invoices specifying the amount due and certifying that services requested under the Contract have been performed by the CONTRACTOR according to the Contract.
  - b. Subject to available funds. Such payments are subject to availability of funds and allotment by the Director of Finance in accordance with chapter 37, HRS. Further, all payments shall be made in accordance with and subject to chapter 40, HRS.
  - c. Prompt payment.
    - (1) Any money, other than retainage, paid to the CONTRACTOR shall be disbursed to subcontractors within ten (10) days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes; and
    - (2) Upon final payment to the CONTRACTOR, full payment to the subcontractor, including retainage, shall be made within ten (10) days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.
  - d. Final payment. Final payment under this Contract shall be subject to sections 103-53 and 103D-328, HRS, which require a tax clearance from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid. Further, in accordance with section 3-122-112, HAR, CONTRACTOR shall provide a certificate affirming that the CONTRACTOR has remained in compliance with all applicable laws as required by this section.
18. Federal Funds. If this Contract is payable in whole or in part from federal funds, CONTRACTOR agrees that, as to the portion of the compensation under this Contract to be payable from federal funds, the CONTRACTOR shall be paid only from such funds received from the federal government, and shall not be paid from any other funds. Failure of the STATE to receive anticipated federal funds shall not be considered a breach by the STATE or an excuse for nonperformance by the CONTRACTOR.
19. Modifications of Contract.
- a. In writing. Any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract permitted by this Contract shall be made by written amendment to this Contract, signed by the CONTRACTOR and the STATE, provided that change orders shall be made in accordance with paragraph 20 herein.
  - b. No oral modification. No oral modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract shall be permitted.



- c. Agency procurement officer. By written order, at any time, and without notice to any surety, the Agency procurement officer may unilaterally order of the CONTRACTOR:
    - (A) Changes in the work within the scope of the Contract; and
    - (B) Changes in the time of performance of the Contract that do not alter the scope of the Contract work.
  - d. Adjustments of price or time for performance. If any modification increases or decreases the CONTRACTOR'S cost of, or the time required for, performance of any part of the work under this Contract, an adjustment shall be made and this Contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined, where applicable, in accordance with the price adjustment clause of this Contract or as negotiated.
  - e. Claim barred after final payment. No claim by the CONTRACTOR for an adjustment hereunder shall be allowed if written modification of the Contract is not made prior to final payment under this Contract.
  - f. Claims not barred. In the absence of a written contract modification, nothing in this clause shall be deemed to restrict the CONTRACTOR'S right to pursue a claim under this Contract or for a breach of contract.
  - g. CPO approval. If this is a professional services contract awarded pursuant to section 103D-303 or 103D-304, HRS, any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract which increases the amount payable to the CONTRACTOR by at least \$25,000.00 or ten per cent (10%) of the initial contract price, whichever increase is higher, must receive the prior approval of the CPO.
  - h. Tax clearance. The STATE may, at its discretion, require the CONTRACTOR to submit to the STATE, prior to the STATE'S approval of any modification, alteration, amendment, change, or extension of any term, provision, or condition of this Contract, a tax clearance from the Director of Taxation, State of Hawaii, and the Internal Revenue Service, U.S. Department of Treasury, showing that all delinquent taxes, if any, levied or accrued under state law and the Internal Revenue Code of 1986, as amended, against the CONTRACTOR have been paid.
  - i. Sole source contracts. Amendments to sole source contracts that would change the original scope of the Contract may only be made with the approval of the CPO. Annual renewal of a sole source contract for services should not be submitted as an amendment.
20. Change Order. The Agency procurement officer may, by a written order signed only by the STATE, at any time, and without notice to any surety, and subject to all appropriate adjustments, make changes within the general scope of this Contract in any one or more of the following:
- (1) Drawings, designs, or specifications, if the goods or services to be furnished are to be specially provided to the STATE in accordance therewith;
  - (2) Method of delivery; or
  - (3) Place of delivery.
- a. Adjustments of price or time for performance. If any change order increases or decreases the CONTRACTOR'S cost of, or the time required for, performance of any part of the work under this Contract, whether or not changed by the order, an adjustment shall be made and the Contract modified in writing accordingly. Any adjustment in the Contract price made pursuant to this provision shall be determined in accordance with the price adjustment provision of this Contract. Failure of the parties to agree to an adjustment shall not excuse the CONTRACTOR from proceeding with the Contract as changed, provided that the Agency procurement officer promptly and duly makes the provisional adjustments in payment or time for performance as may be reasonable. By

proceeding with the work, the CONTRACTOR shall not be deemed to have prejudiced any claim for additional compensation, or any extension of time for completion.

- b. Time period for claim. Within ten (10) days after receipt of a written change order under subparagraph 20a, unless the period is extended by the Agency procurement officer in writing, the CONTRACTOR shall respond with a claim for an adjustment. The requirement for a timely written response by CONTRACTOR cannot be waived and shall be a condition precedent to the assertion of a claim.
- c. Claim barred after final payment. No claim by the CONTRACTOR for an adjustment hereunder shall be allowed if a written response is not given prior to final payment under this Contract.
- d. Other claims not barred. In the absence of a change order, nothing in this paragraph 20 shall be deemed to restrict the CONTRACTOR'S right to pursue a claim under the Contract or for breach of contract.

21. Price Adjustment.

- a. Price adjustment. Any adjustment in the contract price pursuant to a provision in this Contract shall be made in one or more of the following ways:
  - (1) By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
  - (2) By unit prices specified in the Contract or subsequently agreed upon;
  - (3) By the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as specified in the Contract or subsequently agreed upon;
  - (4) In such other manner as the parties may mutually agree; or
  - (5) In the absence of agreement between the parties, by a unilateral determination by the Agency procurement officer of the costs attributable to the event or situation covered by the provision, plus appropriate profit or fee, all as computed by the Agency procurement officer in accordance with generally accepted accounting principles and applicable sections of chapters 3-123 and 3-126, HAR.
- b. Submission of cost or pricing data. The CONTRACTOR shall provide cost or pricing data for any price adjustments subject to the provisions of chapter 3-122, HAR.

22. Variation in Quantity for Definite Quantity Contracts. Upon the agreement of the STATE and the CONTRACTOR, the quantity of goods or services, or both, if a definite quantity is specified in this Contract, may be increased by a maximum of ten per cent (10%); provided the unit prices will remain the same except for any price adjustments otherwise applicable; and the Agency procurement officer makes a written determination that such an increase will either be more economical than awarding another contract or that it would not be practical to award another contract.

23. Changes in Cost-Reimbursement Contract. If this Contract is a cost-reimbursement contract, the following provisions shall apply:

- a. The Agency procurement officer may at any time by written order, and without notice to the sureties, if any, make changes within the general scope of the Contract in any one or more of the following:
  - (1) Description of performance (Attachment 1);
  - (2) Time of performance (i.e., hours of the day, days of the week, etc.);
  - (3) Place of performance of services;

- (4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the STATE in accordance with the drawings, designs, or specifications;
  - (5) Method of shipment or packing of supplies; or
  - (6) Place of delivery.
- b. If any change causes an increase or decrease in the estimated cost of, or the time required for performance of, any part of the performance under this Contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this Contract, the Agency procurement officer shall make an equitable adjustment in the (1) estimated cost, delivery or completion schedule, or both; (2) amount of any fixed fee; and (3) other affected terms and shall modify the Contract accordingly.
  - c. The CONTRACTOR must assert the CONTRACTOR'S rights to an adjustment under this provision within thirty (30) days from the day of receipt of the written order. However, if the Agency procurement officer decides that the facts justify it, the Agency procurement officer may receive and act upon a proposal submitted before final payment under the Contract.
  - d. Failure to agree to any adjustment shall be a dispute under paragraph 11 of this Contract. However, nothing in this provision shall excuse the CONTRACTOR from proceeding with the Contract as changed.
  - e. Notwithstanding the terms and conditions of subparagraphs 23a and 23b, the estimated cost of this Contract and, if this Contract is incrementally funded, the funds allotted for the performance of this Contract, shall not be increased or considered to be increased except by specific written modification of the Contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract.
24. Confidentiality of Material.
- a. All material given to or made available to the CONTRACTOR by virtue of this Contract, which is identified as proprietary or confidential information, will be safeguarded by the CONTRACTOR and shall not be disclosed to any individual or organization without the prior written approval of the STATE.
  - b. All information, data, or other material provided by the CONTRACTOR to the STATE shall be subject to the Uniform Information Practices Act, chapter 92F, HRS.
25. Publicity. The CONTRACTOR shall not refer to the STATE, or any office, agency, or officer thereof, or any state employee, including the HOPA, the CPO, the Agency procurement officer, or to the services or goods, or both, provided under this Contract, in any of the CONTRACTOR'S brochures, advertisements, or other publicity of the CONTRACTOR. All media contacts with the CONTRACTOR about the subject matter of this Contract shall be referred to the Agency procurement officer.
26. Ownership Rights and Copyright. The STATE shall have complete ownership of all material, both finished and unfinished, which is developed, prepared, assembled, or conceived by the CONTRACTOR pursuant to this Contract, and all such material shall be considered "works made for hire." All such material shall be delivered to the STATE upon expiration or termination of this Contract. The STATE, in its sole discretion, shall have the exclusive right to copyright any product, concept, or material developed, prepared, assembled, or conceived by the CONTRACTOR pursuant to this Contract.
27. Liens and Warranties. Goods provided under this Contract shall be provided free of all liens and provided together with all applicable warranties, or with the warranties described in the Contract documents, whichever are greater.

28. **Audit of Books and Records of the CONTRACTOR.** The STATE may, at reasonable times and places, audit the books and records of the CONTRACTOR, prospective contractor, subcontractor, or prospective subcontractor which are related to:
- a. The cost or pricing data, and
  - b. A state contract, including subcontracts, other than a firm fixed-price contract.
29. **Cost or Pricing Data.** Cost or pricing data must be submitted to the Agency procurement officer and timely certified as accurate for contracts over \$100,000 unless the contract is for a multiple-term or as otherwise specified by the Agency procurement officer. Unless otherwise required by the Agency procurement officer, cost or pricing data submission is not required for contracts awarded pursuant to competitive sealed bid procedures.
- If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, the STATE is entitled to an adjustment of the contract price, including profit or fee, to exclude any significant sum by which the price, including profit or fee, was increased because of the defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data was not used or relied upon, the price will be reduced in such amount.
30. **Audit of Cost or Pricing Data.** When cost or pricing principles are applicable, the STATE may require an audit of cost or pricing data.
31. **Records Retention.**
- (1) Upon any termination of this Contract or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
  - (2) The CONTRACTOR and any subcontractors shall maintain the files, books, and records that relate to the Contract, including any personal information created or received by the CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least three (3) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the three (3) year, or longer retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS or returned to the STATE at the request of the STATE.
32. **Antitrust Claims.** The STATE and the CONTRACTOR recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, the CONTRACTOR hereby assigns to STATE any and all claims for overcharges as to goods and materials purchased in connection with this Contract, except as to overcharges which result from violations commencing after the price is established under this Contract and which are not passed on to the STATE under an escalation clause.
33. **Patented Articles.** The CONTRACTOR shall defend, indemnify, and hold harmless the STATE, and its officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys fees, and all claims, suits, and demands arising out of or resulting from any claims, demands, or actions by the patent holder for infringement or other improper or unauthorized use of any patented article, patented process, or patented appliance in connection with this Contract. The CONTRACTOR shall be solely responsible for correcting or curing to the satisfaction of the STATE any such infringement or improper or unauthorized use, including, without limitation: (a) furnishing at no cost to the STATE a substitute article, process, or appliance acceptable to the STATE, (b) paying royalties or other required payments to the patent holder, (c) obtaining proper authorizations or releases from the patent holder, and (d) furnishing such security to or making such arrangements with the patent holder as may be necessary to correct or cure any such infringement or improper or unauthorized use.

34. Governing Law. The validity of this Contract and any of its terms or provisions, as well as the rights and duties of the parties to this Contract, shall be governed by the laws of the State of Hawaii. Any action at law or in equity to enforce or interpret the provisions of this Contract shall be brought in a state court of competent jurisdiction in Honolulu, Hawaii.
35. Compliance with Laws. The CONTRACTOR shall comply with all federal, state, and county laws, ordinances, codes, rules, and regulations, as the same may be amended from time to time, that in any way affect the CONTRACTOR'S performance of this Contract.
36. Conflict Between General Conditions and Procurement Rules. In the event of a conflict between the General Conditions and the procurement rules, the procurement rules in effect on the date this Contract became effective shall control and are hereby incorporated by reference.
37. Entire Contract. This Contract sets forth all of the agreements, conditions, understandings, promises, warranties, and representations between the STATE and the CONTRACTOR relative to this Contract. This Contract supersedes all prior agreements, conditions, understandings, promises, warranties, and representations, which shall have no further force or effect. There are no agreements, conditions, understandings, promises, warranties, or representations, oral or written, express or implied, between the STATE and the CONTRACTOR other than as set forth or as referred to herein.
38. Severability. In the event that any provision of this Contract is declared invalid or unenforceable by a court, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining terms of this Contract.
39. Waiver. The failure of the STATE to insist upon the strict compliance with any term, provision, or condition of this Contract shall not constitute or be deemed to constitute a waiver or relinquishment of the STATE'S right to enforce the same in accordance with this Contract. The fact that the STATE specifically refers to one provision of the procurement rules or one section of the Hawaii Revised Statutes, and does not include other provisions or statutory sections in this Contract shall not constitute a waiver or relinquishment of the STATE'S rights or the CONTRACTOR'S obligations under the procurement rules or statutes.
40. Pollution Control. If during the performance of this Contract, the CONTRACTOR encounters a "release" or a "threatened release" of a reportable quantity of a "hazardous substance," "pollutant," or "contaminant" as those terms are defined in section 128D-1, HRS, the CONTRACTOR shall immediately notify the STATE and all other appropriate state, county, or federal agencies as required by law. The Contractor shall take all necessary actions, including stopping work, to avoid causing, contributing to, or making worse a release of a hazardous substance, pollutant, or contaminant, and shall promptly obey any orders the Environmental Protection Agency or the state Department of Health issues in response to the release. In the event there is an ensuing cease-work period, and the STATE determines that this Contract requires an adjustment of the time for performance, the Contract shall be modified in writing accordingly.
41. Campaign Contributions. The CONTRACTOR is hereby notified of the applicability of 11-205.5, HRS, which states that campaign contributions are prohibited from specified state or county government contractors during the terms of their contracts if the contractors are paid with funds appropriated by a legislative body.
42. Confidentiality of Personal Information.
- a. Definitions.
- "Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, when either name or data elements are not encrypted:
- (1) Social security number;
  - (2) Driver's license number or Hawaii identification card number; or

- (3) Account number, credit or debit card number, access code, or password that would permit access to an individual's financial information.

Personal information does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

"Technological safeguards" means the technology and the policy and procedures for use of the technology to protect and control access to personal information.

b. Confidentiality of Material.

- (1) All material given to or made available to the CONTRACTOR by the STATE by virtue of this Contract which is identified as personal information, shall be safeguarded by the CONTRACTOR and shall not be disclosed without the prior written approval of the STATE.
- (2) CONTRACTOR agrees not to retain, use, or disclose personal information for any purpose other than as permitted or required by this Contract.
- (3) CONTRACTOR agrees to implement appropriate "technological safeguards" that are acceptable to the STATE to reduce the risk of unauthorized access to personal information.
- (4) CONTRACTOR shall report to the STATE in a prompt and complete manner any security breaches involving personal information.
- (5) CONTRACTOR agrees to mitigate, to the extent practicable, any harmful effect that is known to CONTRACTOR because of a use or disclosure of personal information by CONTRACTOR in violation of the requirements of this paragraph.
- (6) CONTRACTOR shall complete and retain a log of all disclosures made of personal information received from the STATE, or personal information created or received by CONTRACTOR on behalf of the STATE.

c. Security Awareness Training and Confidentiality Agreements.

- (1) CONTRACTOR certifies that all of its employees who will have access to the personal information have completed training on security awareness topics relating to protecting personal information.
- (2) CONTRACTOR certifies that confidentiality agreements have been signed by all of its employees who will have access to the personal information acknowledging that:
  - (A) The personal information collected, used, or maintained by the CONTRACTOR will be treated as confidential;
  - (B) Access to the personal information will be allowed only as necessary to perform the Contract; and
  - (C) Use of the personal information will be restricted to uses consistent with the services subject to this Contract.

- d. Termination for Cause. In addition to any other remedies provided for by this Contract, if the STATE learns of a material breach by CONTRACTOR of this paragraph by CONTRACTOR, the STATE may at its sole discretion:

- (1) Provide an opportunity for the CONTRACTOR to cure the breach or end the violation; or
- (2) Immediately terminate this Contract.

In either instance, the CONTRACTOR and the STATE shall follow chapter 487N, HRS, with respect to notification of a security breach of personal information.

e. Records Retention.

- (1) Upon any termination of this Contract or as otherwise required by applicable law, CONTRACTOR shall, pursuant to chapter 487R, HRS, destroy all copies (paper or electronic form) of personal information received from the STATE.
- (2) The CONTRACTOR and any subcontractors shall maintain the files, books, and records that relate to the Contract, including any personal information created or received by the CONTRACTOR on behalf of the STATE, and any cost or pricing data, for at least three (3) years after the date of final payment under the Contract. The personal information shall continue to be confidential and shall only be disclosed as permitted or required by law. After the three (3) year, or longer retention period as required by law has ended, the files, books, and records that contain personal information shall be destroyed pursuant to chapter 487R, HRS or returned to the STATE at the request of the STATE.

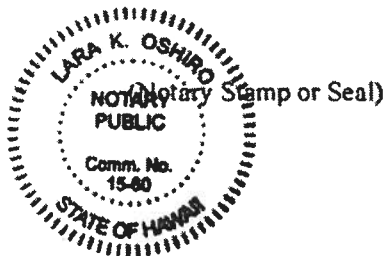


STATE OF HAWAII

CONTRACTOR'S ACKNOWLEDGMENT

STATE OF Hawaii )  
 ) SS.  
City and COUNTY OF Honolulu )

On this \_\_\_\_\_ day of \_\_\_\_\_, 2016 before me appeared  
Riki May Amano \_\_\_\_\_ and N/A \_\_\_\_\_, to me  
known, to be the person(s) described in and, who, being by me duly sworn, did say that he/she/they is/are  
Riki May Amano \_\_\_\_\_ and N/A \_\_\_\_\_ of  
\_\_\_\_\_, the  
CONTRACTOR named in the foregoing instrument, and that he/she/they is/are authorized to sign said  
instrument on behalf of the CONTRACTOR, and acknowledges that he/she/they executed said  
instrument as the free act and deed of the CONTRACTOR.

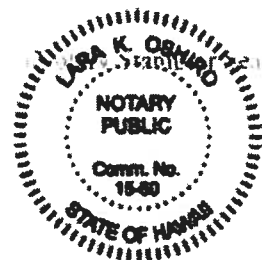


[Signature]  
\_\_\_\_\_  
Lara K. Oshiro  
(Print Name)

Notary Public, State of Hawaii  
My commission expires: 2/8/2019

Doc. Date: March 31, 2016 # Pages: 2  
Notary Name: Lara K. Oshiro 1st Circuit  
Doc. Description: Contractor's Standards of  
Conduct Declaration

[Signature] 3/31/16  
Notary Signature Date  
NOTARY CERTIFICATION







STATE OF HAWAII  
**CONTRACTOR'S  
STANDARDS OF CONDUCT DECLARATION**

For the purposes of this declaration:

"Agency" means and includes the State, the legislature and its committees, all executive departments, boards, commissions, committees, bureaus, offices; and all independent commissions and other establishments of the state government but excluding the courts.

"Controlling interest" means an interest in a business or other undertaking which is sufficient in fact to control, whether the interest is greater or less than fifty per cent (50%).

"Employee" means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and employees under contract to the State or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices, and judges. (Section 84-3, HRS).

On behalf of Riki May Amano, CONTRACTOR, the undersigned does declare as follows:

1. CONTRACTOR ☐ is ☒ is not a legislator or an employee or a business in which a legislator or an employee has a controlling interest. (Section 84-15(a), HRS).
2. CONTRACTOR has not been represented or assisted personally in the matter by an individual who has been an employee of the agency awarding this Contract within the preceding two years and who participated while so employed in the matter with which the Contract is directly concerned. (Section 84-15(b), HRS).
3. CONTRACTOR has not been assisted or represented by a legislator or employee for a fee or other compensation to obtain this Contract and will not be assisted or represented by a legislator or employee for a fee or other compensation in the performance of this Contract, if the legislator or employee had been involved in the development or award of the Contract. (Section 84-14 (d), HRS).
4. CONTRACTOR has not been represented on matters related to this Contract, for a fee or other consideration by an individual who, within the past twelve (12) months, has been an agency employee, or in the case of the Legislature, a legislator, and participated while an employee or legislator on matters related to this Contract. (Sections 84-18(b) and (c), HRS).

CONTRACTOR understands that the Contract to which this document is attached is voidable on behalf of the STATE if this Contract was entered into in violation of any provision of chapter 84, Hawaii Revised Statutes, commonly referred to as the Code of Ethics, including the provisions which are the source of the declarations above. Additionally, any fee, compensation, gift, or profit received by any person as a result of a violation of the Code of Ethics may be recovered by the STATE.

**\*Reminder to Agency:** If the "is" block is checked and if the Contract involves goods or services of a value in excess of \$10,000, the Contract must be awarded by competitive sealed bidding under section 103D-302, HRS, or a competitive sealed proposal under section 103D-303, HRS. Otherwise, the Agency may not award the Contract unless it posts a notice of its intent to award it and files a copy of the notice with the State Ethics Commission. (Section 84-15(a), HRS).

**CONTRACTOR**

By 

(Signature)

Print Name Riki May Amano

Print Title JUDGE (RET.)

Name of Contractor Riki May Amano

Date 3/31/2016



## STATE OF HAWAII SCOPE OF SERVICES

CONTRACTOR will serve as the Administrative Hearing Officer on behalf of the Board of Land and Natural Resources to perform the following duties as required by Chapters 91, 171 and 183C, Hawaii Revised Statutes, and the Hawaii Administrative Rules adopted thereunder, pertaining to the Contested Case Hearing Regarding Conservation District Use Permit (CDUP) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Kahohe Mauka, Hamakua District, Island of Hawaii, TMK (3) 4-4-015:008:

1. Review staff files and submittals related to previous Land Board proceedings in the case;
2. Conduct site visits of the subject and surrounding areas, if necessary;
3. Conduct pre-hearing conferences, if necessary;
4. Conduct contested case hearings on the islands of Hawaii and Oahu;
5. Draft and review minute orders, briefs, motions and other filings as needed;
6. Issue a Hearing Officer's Draft Proposed Findings of Fact, Conclusions of Law, and Final Decision and Order (D&O) for the contested case hearing;
7. Review and revise the proposed D&O with propositions and exceptions from parties, if necessary; and
8. Issue a Hearing Officer's Final Proposed Findings of Fact, Conclusions of Law, and Decision and Order, subject to the review and approval by the Land Board.



STATE OF HAWAII

**COMPENSATION AND PAYMENT SCHEDULE**

All compensations and reimbursements for legal services as an administrative hearing officer provided for under this Contract shall apply an hourly rate [REDACTED] for the actual time expended, subject to a limit of [REDACTED] for the total charge.

CONTRACTOR shall submit a monthly invoice to the Department of Land and Natural Resources, Administrative Proceedings Office, at 1151 Punchbowl Street, Room 130, Honolulu, Hawaii 96813.



## **STATE OF HAWAII**

### **TIME OF PERFORMANCE**

Performance of services by CONTRACTOR shall timely commence on the effective date of the Contract. All services shall be completed by June 30, 2017, unless this Contract is terminated as provided herein this Contract.

If there are any circumstances that require an extension of this Contract, CONTRACTOR shall give a written notice to STATE at least thirty days prior to this intended completion date, which shall specify the particular circumstances and the extension required. It is expressly understood that the Chairperson may, upon this written request of the CONTRACTOR and for good cause, extend the terms of this Contract.

STATE personnel shall closely monitor the performance of the work by the CONTRACTOR for the duration of the Project.



## STATE OF HAWAII

**CERTIFICATE OF EXEMPTION  
FROM CIVIL SERVICE****1. By Heads of Departments Delegated by the Director of the Department of Human Resources Development ("DHRD").\***

Pursuant to a delegation of the authority by the Director of DHRD, I certify that the services to be provided under this Contract, and the person(s) providing the services under this Contract are exempt from the civil service, pursuant to § 76-16, Hawaii Revised Statutes (HRS).

(Signature)

Suzanne D. Case

(Print Name)

Chairperson, Board of Land and Natural Resources

(Print Title)

(Date)

3/31/2014

\* This part of the form may be used by all department heads and the heads of attached agencies to whom the Director of DHRD expressly has delegated authority to certify § 76-16, HRS, civil service exemptions. The specific paragraph(s) of § 76-16, HRS, upon which an exemption is based should be noted in the contract file. If an exemption is based on § 76-16(b)(15), the contract must meet the following conditions:

- (1) It involves the delivery of completed work or product by or during a specific time;
- (2) There is no employee-employer relationship; and
- (3) The authorized funding for the service is from other than the "A" or personal services cost element.

NOTE: Not all attached agencies have received a delegation under § 76-16(b)(15). If in doubt, attached agencies should check with the Director of DHRD prior to certifying an exemption under § 76-16(b)(15). Authority to certify exemptions under §§ 76-16(b)(2), and 76-16(b)(12), HRS, has not been delegated; only the Director of DHRD may certify §§ 76-16(b)(2), and 76-16(b)(12) exemptions.

**2. By the Director of DHRD, State of Hawaii.**

I certify that the services to be provided under this Contract, and the person(s) providing the services under this Contract are exempt from the civil service, pursuant to § 76-16, HRS.

(Signature)

(Date)

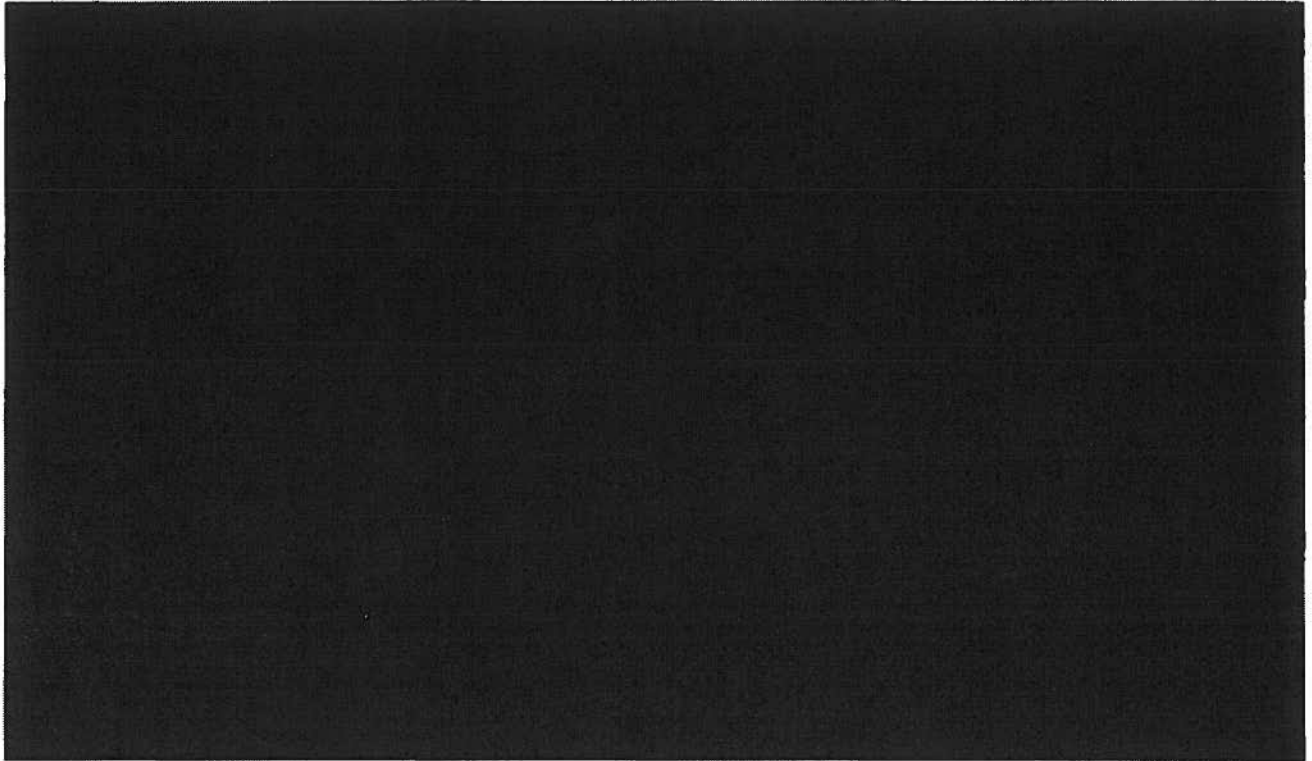
(Print Name)

(Print Title, if designee of the Director of DHRD)



**STATE OF HAWAII**  
**SPECIAL CONDITIONS**

The General Conditions are revised as follows:



cc > TK  
LNMI  
- ILG

**RICHARD NAIWIEHA WURDEMAN**  
**Attorney at Law, A Law Corporation**

**Pauahi Tower, Suite 720, 1003 Bishop Street, Honolulu, Hawaii 96813** '16 APR 4 11:55AM  
**Telephone: (808) 536-0633 \* Facsimile: (808) 536-0634**  
**e-mail: rnwurdeman@rnwlaw.com**

April 4, 2016

VIA Hand-Delivery

Suzanne Case  
Chair, Board of Land and Natural Resources  
c/o William J. Wynhoff, Esq.  
and Julie H. China, Esq.  
Department of the Attorney General  
465 South King Street, Room 300  
Honolulu, HI 96813

RE: Mauna Kea Anaina Hou, et al. v. Board of Land and Natural  
Resources, et al.; Civ. No. 13-1-0349; SCAP-14-0873  
DLNR Docket No. HA-11-05—UH/TMT CDUP Application/HA;  
3568, Case No. BLNR CC-16-002

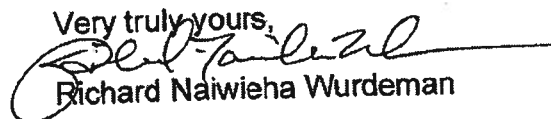
Dear Chair Case:

I am writing to you again on behalf of my clients, Mauna Kea Anaina Hou and Kealoha Pisciotto, Clarence Kukauakahi Ching, Flores-Case 'Ohana, Deborah J. Ward, Paul K. Neves, and Kahea: The Hawaiian Environmental Alliance, a domestic non-profit corporation.

In that the Minute Order No. 1, filed in the above-referenced case, states that the objection deadline for the selection of the hearing officer is April 15, 2016; instead of the thirty (30) day period described for response to the written requests made to you, dated April 1, 2016, the time period for production of all documents and information made in that April 1, 2016 request is hereby amended to production by April 11, 2016. This request is being made without the petitioners waiving any positions and without waiving any objections.

Thank you very much for your attention to this matter.

Very truly yours,

  
Richard Naiwieha Wurdeman

cc: ✓ Ian L. Sandison, Esq./Timothy Lui-Kwan, Esq.

**RICHARD NAIWIEHA WURDEMAN**  
**Attorney at Law, A Law Corporation**

**Pauahi Tower, Suite 720, 1003 Bishop Street, Honolulu, Hawaii 96813**  
**Telephone: (808) 536-0633 \* Facsimile: (808) 536-0634**  
**e-mail: [rnwurdeman@rnwlaw.com](mailto:rnwurdeman@rnwlaw.com)**

April 4, 2016

VIA Hand-Delivery

Suzanne Case  
Chair, Board of Land and Natural Resources  
c/o William J. Wynhoff, Esq.  
and Julie H. China, Esq.  
Department of the Attorney General  
State of Hawaii  
465 South King Street, Room 300  
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I was forwarded a copy of the Minute Order No. 1 in the above-referenced matter in which Judge (ret.) Riki May Amano was selected as a hearing officer. Without waiving any of our positions and objections and potential objections, I request copies of the following, and as required by HAR Section 3-122-63(a): (a) the contract, (b) the list of qualified persons, (c) the screening committee's criteria for selection established under section 103D-304(d), HRS, and (d) statement of qualifications and related information submitted by the qualified persons (except those portions for which a written request for confidentiality has been made subject to section 3-122-58).

Please also provide any legal authority as to why BLNR Board Member Christopher Yuen does not fall under the "or equivalent appointed persons" preclusion to sit on the selection committee, under HAR Section 3-122-69(b).



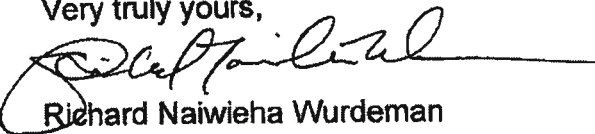
Chair Suzanne Case  
April 4, 2016  
Page -2-

when the Chair of the BLNR (the equivalent in the instant matter to a Department Director) is the person making the request for professional services under the procurement code.

Please also confirm that the three-member selection committee was made up of Justice (ret.) James Duffy, Deputy Attorney General Stella Kam, and BLNR Board Member Christopher Yuen.

Thank you very much for your attention to this matter. In that the stated deadline for objections is April 15, 2016, according to Minute Order No.1, and that HAR Section 3-122-63 provides that information shall be open to public inspection, upon the contract being awarded, please make the requested copies and information available forthwith.

Very truly yours,



Richard Naiwieha Wurdeman

cc: ✓ Ian L. Sandison, Esq./Timothy Lui-Kwan, Esq.